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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO

MALIBU MEDIA, LLC,

Plaintiff,

vs.

KEVIN PETERSON,

Defendant.

KEVIN PETERSON

Counterclaimaint

v.

MALIBU MEDIA, LLC

Counterdefendant

Case Number: 3:16-CV-00786-JLS-NLS

MOTION TO STRIKE AFFIRMATIVE DEFENSES

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

Plaintiff Malibu Media, LLC ("Plaintiff"), by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 12(f), moves for the entry of an order striking the affirmative defenses asserted by Defendant , Kevin Peterson ("Defendant"), and states:

I. INTRODUCTION

Defendant's Answer contains eight affirmative defenses, each of which is either foreclosed by law or factually unsupportable and inadequately alleged. In order to streamline the litigation and discovery process and to avoid prejudicing Plaintiff by needlessly increasing the duration and expense of litigation, Plaintiff moves to strike Defendant's affirmative defenses.

II. ARGUMENT

A. Legal Standard

"The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Indeed, "[a]n insufficient defense fails to give the plaintiff fair notice of the nature of the defense." *J & J Sports Prods., Inc. v. Jimenez*, 2010 WL 5173717 at *1 (S.D.Cal. 2010) (striking affirmative defenses that are mere "boilerplate recitations [and] Defendants have not provided any facts related to the[] defenses.") quoting *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir.1979). "[C]ourts will generally grant a motion to strike when the moving party has proved that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Id*. "Fair notice generally requires that the defendant state the nature and grounds for the affirmative defense . . . [and] an affirmative defense is legally insufficient if it clearly lacks merit 'under any set of facts the defendant might allege.'" *Kohler v .Staples the Office Superstore, LLC*, 291 F.R.D. 464, 467-68 (S.D. Cal. 2013). The Ninth Circuit has not yet decided whether the pleading standard in *Twombly*, and *Iqbal* applies to affirmative defenses. District courts within the Ninth Circuit are split on the issue. *See J & J Sports Prods., Inc. v. Jimenez*, 2010 WL 5173717 at *1 (S.D.Cal. 2010). This Court agrees with the reasoning of those courts which have held that district courts in this circuit remain bound by the holding of *Wyshak*, 607 F.2d at 827. *See Trustmark Ins. Co. v. C & K Mkt., Inc.*, No. CV 10-0465-MO, 2011 WL 587574, at *1 (D. Or. Feb. 10, 2011). Accordingly, "[t]he key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense." *Wyshak*, 607 F.2d at 827.

Striking affirmative defenses is an important and valued mechanism in federal court litigation because it helps "avoid the expenditure of time and money that must arise from litigating spurious [affirmative defenses] by dispensing with those issues prior to trial." *Frazier v. City of Rancho Cordova*, No. 2:15-cv-00872, 2016 WL 374567, at *2 (E.D. Cal. Feb. 1, 2016). Affirmative defenses that are insufficient as a matter of law—because they are not adequately alleged or otherwise—"should be stricken to eliminate the delay and unnecessary expense from litigating the invalid claim." *E.g.*, *Estee Lauder, Inc. v. Fragrance Counter, Inc.*, 189 F.R.D. 269, 272 (S.D.N.Y. 1999); *see also Coach, Inc. v. Kmart Corps.*, 756 F. Supp.2d 421, 426 (S.D.N.Y. 2010) ("[I]nclusion of a defense that must fail as a matter of law prejudices the plaintiff because it will needlessly increase the duration and expense of litigation.").

B. First Affirmative Defense: Unclean Hands

Defendant's first affirmative defense is unclean hands, an equitable defense that is "recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action." *Dream Games of Arizona Inc. v. PC Onsite*, 561 F.3d 983, 990–91 (9th Cir. 2009). The defense only "prevents the copyright owner from asserting infringement and asking for damages *when the infringement occurred by his dereliction of duty*." *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408 (9th Cir. 1986) (emphasis added); *Oracle Am., Inc. v. Terix Computer Co., Inc.*, No. 5:13-cv-03385, 2015 WL 1886968, at *5 (N.D. Cal. April 24, 2015) (same); *see also Dream Games*, 561 F.3d at 990–91 (even "fraudulent content is not a basis for denying copyright protection," nor is "illegal use or operation of a work by the copyright owner" a sufficient basis to support an unclean hands defense. Instead, the defense is recognized "when plaintiff misused the process of the courts by falsifying a court order or evidence, or by misrepresenting the scope of his copyright to the court and opposing party"). Controlling precedent further holds that "the alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff's conduct." *Dream Games*, 561 F.3d at 990. "If the defendant can do no more than show that the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums." *Id.*

Here, Defendant does not allege that Plaintiff has falsified evidence or engaged in any wrongdoing related to Defendant's infringement. Instead, Defendant simply (and erroneously) alleges that Plaintiff engaged in some legal offense affecting the public at large due to its "failure to comply with Federal, State, and local laws, regulations, and ordinances." CM/ECF 12 at p. 8. As a matter of law, this is insufficient and Defendant's first affirmative defense should be striken. *Accord, e.g.*, *Malibu Media v. Doe*, No. 13-11432, 2014 WL 2616902, at *3 (E.D. Mich. June 12, 2014) (striking unclean hands affirmative defense under similar circumstances); *Malibu Media, LLC v. Lee*, No. 12–03900, 2013 WL 2252650, *9 (D. N.J. May 22, 2013) (same): *Malibu Media, LLC v. Batz*, No. 12-cv-01953, 2013 WL 2120412, at *5 (D. Colo. April 5, 2013) (same).

C. Second Affirmative Defense: Implied License

Defendant's second affirmative defense of implied license likewise fails. Although the Copyright Act does not permit the exclusive transfer of copyright ownership absent a writing, a court may find that a nonexclusive license has been implied by either the conduct of, or an oral agreement between, the parties involved. *See Effects Assocs. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990). In the Ninth Circuit, "an implied license is granted when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work." *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 754–55 (9th Cir. 2008); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990); *Techsavies, LLC v. WDFA Mktg. Inc.*, No. C10-1213, 2011 WL 589809, at *4 (N.D. Cal. Feb. 10, 2011).

Here, Defendant fails to plead the foregoing requisite elements to support a viable implied license defense. Defendant has not and cannot allege that he requested the work in question from Plaintiff since, prior to this lawsuit, Plaintiff and Defendant were total strangers. Second, in the context of unauthorized file sharing, under no set of circumstances can Defendant establish that Plaintiff created the work and delivered it to Defendant pursuant to a "meeting of the minds." *See, e.g., Farr v. Ohio Oil Co*., 129 F. Supp. 219, 220 (N.D. Ind. 1955) (holding that an implied contract "grows out of the intentions of the parties and there must be a meeting of the minds."); *Ulloa v. Universal Music and Video Distribution Corp*., 303 F.Supp.2d 409, 416 (S.D.N.Y.2004) ("In order to establish an implied license, as for any implied contract, they must prove that there was a meeting of the minds.") Third, under the facts in this case, Plaintiff clearly did not intend for Defendant to copy and distribute the work, since it is now suing Defendant for infringement. *See, e.g., Luar Music Corp. v. Universal Music Group, Inc*., 861 F.Supp.2d 30, 37 (D.P.R. 2012) ("Nonexclusive licenses may be granted if the copyright owner does not object to the putative infringer's use of copyrighted material.").

Not only does Defendant fail to allege the necessary elements, but he repeatedly and unambiguously disclaims "sufficient knowledge or information" about Plaintiff and the copyrighted works in dispute. *See generally* CM/ECF 12. Therefore, for the aforementioned reasons, an implied license affirmative defense is foreclosed and should be striken.

D. Third Affirmative Defense: Laches

Defendant's third affirmative defense is that Plaintiff's claim is barred by the doctrine of laches since "Plaintiff took no efforts to curtail the alleged infringements." CM/ECF 12 at p. 9. Though this affirmative defense is written more like a failure to mitigate defense than a laches defense, it nonetheless fails a matter of law pursuant to unambiguous Supreme Court precedent. The Supreme Court has held that in the context of copyright infringement, the equitable defense of laches fails when the copyright holder plaintiff commences its infringement action within the applicable three-year statute of limitations. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1972–73 (2014) (explaining that a laches or statute of limitations defense cannot be invoked to preclude a copyright infringement claim if the claim is brought within the Copyright Act's three-year limitations period). Here, Plaintiff commenced this action by filing its complaint on April 1, 2016 [CM/ECF 1], and so a laches defense is viable only to the extent Defendant's infringements occurred prior to April 1, 2013. *See Petrella*, 134 S.Ct. at 1972–73. Yet every single one of Defendant's infringements is alleged to have occurred between May 12, 2013 and January 11, 2016 (*i.e.*, after April 1, 2013 and well within the applicable limitations period).

E. Fourth Affirmative Defense: Unconstitutionally Excessive Damages

Defendant's fourth affirmative defense asserts, without any supporting facts or analysis, that "[t]he measure of damages sought by Plaintiff is unconstitutionally excessive." CM/ECF 12 at p. 9. Not only is Defendant's vague challenge to Plaintiff's request for damages not a cognizable affirmative defense, but in this case Plaintiff has elected to recover per-work statutory damages pursuant to the Copyright Act, 17 U.S.C. § 504(a) and (c). *See* CM/ECF 7 at p. 7. The statutory damages promulgated by the Legislature and set forth under the Copyright Act have already been deemed constitutional. The one court that attempted to undermine Congress by finding that entry of statutory damages might be unconstitutionally excessive was reversed on appeal. *See Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 496 (1st Cir. 2011) (reversing ruling that statutory damages were excessive and reinstating original $675,000.00 ($22,500.00 per work) award, expressly finding same to be constitutional and not excessive). Indeed, courts that have considered Defendant's fourth affirmative defense have universally rejected it, and the Ninth Circuit has made clear that "[a] statutory damages award within the limits prescribed by Congress is appropriate even for uninjurious and unprofitable invasions of copyright. We have consistently held that statutory damages are recoverable" and not unconstitutionally excessive. *New Form, Inc. v. Tekila Films, Inc.*, 357 Fed.Appx. 10, 11 (9th Cir. 2009); *see also Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012) ("Congress, exercising its 'wide latitude of discretion,' set a [constitutionally permissible] statutory damages range for willful copyright infringement of $750 to $150,000 per infringed work. … Congress no doubt was aware of the serious problem posed by online copyright infringement [when it did so]."); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 578, 587–88 (6th Cir. 2007) (rejecting argument that statutory damages within the constitutional range of $750 and $150,000 per copyright infringed could violate due process).

F. Fifth Affirmative Defense: Failure to Mitigate Damages

Defendant's fifth affirmative defense, entitled "Failure to Mitigate Damages," states that "[u]pon information and belief, rather than discouraging the purportedly unlawful sharing of its works via BitTorrent, Plaintiff has actively engaged in activity designed to encourage the sharing of its works via BitTorrent." CM/ECF 12 at p. 9. Defendant's allegations are false and lack evidentiary support. [1] Defendant's fifth affirmative defense fails as a matter of law because a failure to mitigate defense is not applicable where, as here, a copyright holder elects to recover statutory damages instead of actual damages. *See* 17 U.S.C. § 504(c)(1) (noting that a copyright owner may elect to recover statutory damages "instead of" actual damages); *Malibu Media, LLC v. Doe*, No. RWT 13-cv-0512, 2015 WL 1402286, at *2 (D. Md. Mar. 25, 2015) ("[D]efenses of failure to mitigate or prove damages are not properly pled where, as here, Malibu has elected to recover *only* statutory damages instead of an award of actual damages and profits. [C]ourts all agree that a copyright plaintiff's exclusive pursuit of statutory damages invalidates a failure to mitigate defense."); *Purzel Video GmbH v. St Pierre*, 10 F. Supp. 3d 1158, 1169 (D. Colo. 2014) ("A copyright plaintiff's exclusive pursuit of statutory damages invalidates a failure-to-mitigate defense"); *Malibu Media, LLC v. Doe*, No. 13-3648, 2014 WL

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[1] *See* Declaration of Colette Field In Support of Plaintiff's Motion for Leave to Serve a Third Party, "To that end we continually invest significant resources into pursuing all types of anti-piracy enforcement such as DMCA takedown notices and directly contacting websites that unlawfully host our works." [CM/ECF 4-2 at p. 2]

2581168, at *5 (N.D. Ill. June 9, 2014) (same); *Malibu Media, LLC v. Fitzpatrick*, No. 1:12-cv-22767, 2013 WL 5674711, *3 n.17 (S.D. Fla. Oct. 17, 2013) (same); *Malibu Media, LLC v. Doe*, No. 1:13-cv-30, 2013 WL 4048513, at *2 (N.D. Ind. Aug. 9, 2013) (same); *Clements v. HSBC Auto Fin., Inc.*, 2010 WL 4281697, *11 (S.D. W.Va. 2010) (same).

G. Sixth Affirmative Defense: Waiver

Defendant's sixth affirmative defense vaguely alleges that, "Plaintiff's claim is barred by the doctrine of waiver." CM/ECF 12 at p. 9. In the copyright context, waiver, which "is the intentional relinquishment of a known right with knowledge

e of its existence," "occurs only if there is an intent by the copyright proprietor to surrender rights in his work." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). Here, although Defendant's Answer and Affirmative Defenses contain other allegations that are false and lack evidentiary support, many of Defendant's allegations completely undermine and disprove a waiver defense. For example, while Defendant repeatedly disclaims any "knowledge or information" regarding Plaintiff and its intentions, Defendant asserts that Plaintiff is a staunch protector of its intellectual property, who has "filed upwards of 4000 lawsuits alleging infringement of its works." CM/ECF 12 at p. 5. Defendant's Answer defeats her sixth affirmative defense, as it is simply a legal impossibility for a copyright holder to strictly enforce and simultaneously waive its copyrights. Plainly, Defendant's Answer does not contain any well-pled allegations that could conceivably indicate that Plaintiff relinquished or intended to relinquish its copyright interests.

H. Seventh Affirmative Defense: Estoppel

Defendant's seventh affirmative defense is the doctrine of estoppel, a defense that is "disfavored and … only applied as needed to avoid injustice." *Bangkok Broadcasting & T.V. Co., Ltd. v. IPTV Corp.*, 742 F. Supp.2d 1101, 1115 (C.D. Cal. 2010) (quoting *Richardson v. U.S.*, 60 U.S. 236, 267 (1856) ("Estoppels, which preclude the party from showing the truth, are not favored.")). Defendant's conclusory affirmative defense is so vague that it, "fails to give

Plaintiff fair notice of "the nature and grounds for the affirmative defense." Kohler, 291 F.R.D. at 467-68.

"[T]o prevail on an estoppel defense, the following four elements must be established: (1) the plaintiff knew of the defendant's allegedly infringing conduct; (2) the plaintiff intended that the defendant rely upon his conduct or act so that the defendant has a right to believe it so intended; (3) the defendant is ignorant of the true facts; and (4) the defendant detrimentally relied upon the plaintiff's conduct." *Id.* (citing *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960)). "The gravamen of estoppel … is misleading and consequent loss. Delay may be involved, but is not an element of the defense." *Petrella*, 134 S.Ct. at 1977.

Here, Defendant's Answer emphasizes that Plaintiff is a known "prodigious litigant" who consistently files suit to prosecute the "infringement of its works via BitTorrent protocol." CM/ECF 12 at p. 5. Any suggestion that Defendant could or would have been misled into thinking that Plaintiff would not enforce Defendant's infringement via BitTorrent is therefore unintelligible. Nothing in Defendant's Answer articulates a basis for Defendant being misled. Further, while affirmative defenses may be inconsistent with one another, Defendant's eighth affirmative defense is actually inconsistent with and wholly antithetical to Defendant's Answer. Defendant's Answer unambiguously denies using BitTorrent to infringe Plaintiff's works. Therefore, it is incoherent to maintain that Plaintiff is estopped from bringing its claim on the basis that Defendant only used BitTorrent to infringe Plaintiff's works because Defendant was misled by Plaintiff into doing so.

I. Eighth Affirmative Defense: Statute of Limitations

Defendant's eighth affirmative defense asserts that, "Upon information and belief, Plaintiff discovered some or all of the works allegedly being shared via the IP address at issue more than 3 years prior to the date the instant action was filed." CM/ECF 12 at p. 10. This affirmative defense must fail because contrary to Defendant's, "information and belief" the Complaint only alleges infringement occurring less than three years prior to the date the instant action was filed. Plaintiff's action was filed on April 1, 2016 CM/ECF 1. Plaintiff has alleged that all 115 infringements occurred between May 12, 2013 and January 11, 2016—clearly falling within the applicable statute of limitations.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order striking with prejudice Defendant's affirmative defenses and granting to Plaintiff any additional and further relief that the Court deems just and equitable under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: */s/ Brenna Erlbaum*